LIM MONG HONG v. REX.

[App. Crim. Juris. (Murray-Aynsley, J.) April 30, 1947]

Criminal Procedure Code, Sections 173 and 176 —Duplicity of Charges.

In this case the accused was convicted on the following charge "That he, on or about the 26th day of November 1946 at about 3 p.m. at Upper Serangoon Road, 5th Milestone, Singapore did cause hurt to one Tan Choon Lim by doing an act to wit driving taxi S.1403 so negligently or rashly as to endanger human life or the personal safety of others and thereby committed an offence punishable under Section 337 of the Penal Code Chapter 20." He appealed against this conviction.

Held, that the charge was bad for duplicity.

Case referred to :—

(1) *Yap Liow Swee v. Public Prosecutor* (1937) F.M.S.L.R. 71; (1937) 6 M.L.J. 225.

MAGISTRATE'S APPEAL.

C. F. J. Ess for the Appellant.

C. H. Butterfield for the Respondent.

Murray-Aynsley, C. J. :—In this case the appellant was charged under section 337 Penal Code. The charge was as follows :—

> That he, on or about the 26th day of November 1946, at about 3 p.m. at Upper Serangoon Road, 5th Mile Stone, Singapore, did cause hurt to one Tan Choon Lim by doing an act to wit driving taxi S.1403 so negligently or rashly as to endanger human life or the personal safety of others and thereby committed an offence punishable under section 337 of the Penal Code Chapter 20.

He was convicted and sentenced to 3 months r.i.

In view of the decision in the case of *Yap Liow Swee*[1] the learned Crown Counsel did not contend that the charge was not bad for duplicity. This was a decision of the full Court of the F.M.S. and I suppose ought to be followed. But for this case I should have held that the English cases on the subject were not applicable in view of s. 176 of the Criminal Procedure Code and the defect, if any, was one of form.

Appeal Allowed.

TAN HOAN KIE v. TAN YEW EE AND FIVE OTHERS.

[Orig. Civil Juris. (Brown, J.) July 23, 1947]

Trustees Ordinance, Section 27 (4)—Statutory declaration by trustee, executing a power of attorney that he intends to remain out of the Colony for a period exceeding fourteen days—When time is of the essence of contract of sale of land—Repudiation of contract of sale of land—action for declaration and for damages—whether summary procedure under Section 4 of Conveyancing and Law of Property Ordinance should have made use of.

In this case the plaintiff at an auction sale held on the 2nd October, 1946 purchased from the defendants, who were trustees of the Chinese Gospel Hall, selling under an order of Court, the piece of land the subject of the action for $23,500/- and paid 25% of the purchase price as deposit to the auctioneers as stakeholders. By a condition of the Conditions of Sale the purchase was to be completed on the 2nd day of November, 1946 or at some later date to be given by the vendor's Solicitors in case of delay in having the assignment executed by the absent vendors or their attorneys. On the 5th of November, 1946 no draft assignment having been sent by the plaintiff's Solicitors for approval the defendants' Solicitors wrote to them to give notice inter alia that "unless the purchase of the property by your client is completed by the 16th instant our clients will treat the deposit as forfeited". On the following day November 6th the plaintiff's Solicitor wrote enclosing the draft assignment and asking that in the case of those trustees who were not in the Colony, the powers of attorney and the Statutory Declarations signed by them as donors should be produced for inspection. The defendants' Solicitors took the view that no Statutory Declaration was necessary as the trustees had been out of the Colony for some considerable time and no Statutory Declarations were produced on the 16th of November when the chief clerk of the plaintiff's Solicitor attended at the office of the defendants' Solicitors with a cheque for the purchase price and asked for them. The chief clerk thereupon said that his instructions were not to complete without them. Thereupon the Solicitor said "Then we can't complete". On the same day the plaintiff's Solicitor wrote to the Defendants' Solicitor that the plaintiff treated the contract as at an end. The plaintiff subsequently brought an action against the defendants.

Held, (1) that in the absence of the Statutory Declaration by the Trustee required by Section 27 (4) of the Trustees Ordinance the law does not give him power to delegate his trust during his absence abroad for a period exceeding fourteen days and that in the absence of the Statutory Declarations the defendants were unable to complete on the completion date, November 16th.

(2) that in this case by their letter of November 5th 1946, the defendants had made the completion date of November 16th 1946 the essence of the contract;

(3) that the defendants' inability to complete on the 16th November 1946 amounted to a repudiation of the contract and that the plaintiff had accepted the repudiation by his letter of the same date;

(4) that as there was in this case more than the short point of whether the Statutory Declaration were required under Section 27 (4) of the Trustees Ordinance and having regard to all the circumstances of the case, the plaintiff's Solicitors were justified in bringing the action instead of making use of the summary procedure under Section 4 of the Conveyancing and Law of Property Ordinance which is intended only for the purpose of deciding short points of law and construction.

Cases referred to :—

(1) *Hatten v. Russel* 38 Ch. 334.

(2) *Stickney v. Keeble* (1915) A.C. 416.

(3) *Harold Wood Brick Company Ltd. v. Ferris* (1935) 2 K.B. 199.

(4) *Warren v. Moore* 14 T.L.R. 138 confirmed on appeal in 14 T.L.R. 497.

(5) *Green v. Sevin* 13 Ch. 589.

(6) *Blay v. Pollard and Morris* (1930) 1 K.B. 634.

(7) *Holden v. Soh Yiew Jin* (1933) 2 M.L.J. 64.

(8) *In re Hargreaves and Thompson's Contract* 32 Ch. 454.

CIVIL SUIT.

D. K. Walters and *Wee Eng Lock* for the plaintiff.

N. A. Mallal and *C. J. Koh* for the defendants.

Brown J. :—In this case the facts are not in dispute. At an auction sale held on the 2nd October 1946 the plaintiff purchased from the defendants, who were Trustees of the Chinese Gospel Hall selling under an Order of the Court, the piece of land which is the subject of this action for $23,500/-, and paid 25% of the purchase price as deposit to the auctioneers who hold it as stakeholders. Condition 2 of the Conditions of Sale reads as follows :—

> 2. The purchase shall be completed on the 2nd day of November, 1946, or at some later date to be given by the Vendors' Solicitors in case of delay in having the Assignment executed by the absent vendors or their attorneys.

Then followed certain correspondence relating to Requisitions on Title; and on the 5th of November the defendants' solicitors wrote to the plaintiff's solicitors pointing out that although the date for completion was the 2nd of November no draft assignment had been sent for their approval and expressing their clients' instructions in the following terms :—

> To give you notice that unless the purchase of the property by your client is completed by the 16th instant our clients will treat the deposit as forfeited, and will resell the property by public auction or private contract and hold your client responsible for the deficiency in price and all expenses.

It was conceded by Mr. Mallal, on behalf of the defendants, that that letter made the 16th of November, as the completion date, the essence of the contract.

On the following day (November 6th) the plaintiff's solicitor wrote enclosing the draft assignment and asking that in the case of those trustees who were not in the Colony, the powers of attorney and the statutory declarations signed by them as donors should be produced for his inspection. Then followed an interchange of letters on the meaning of section 27 (4) of the Trustees Ordinance, which raises the first point which I have to decide. The defendants' solicitor took the view that the statutory declaration for which the sub-section provides is only required where the trustee intends to remain out of the Colony for a period exceeding 14 days, and that as these trustees had been out of the Colony for some considerable time no statutory declarations were necessary.

Section 27 (4) of the Trustees Ordinance reads as follows :—

> (4) The power of attorney shall be attested by at least one witness, and shall be deposited in the Registry of the Supreme Court within ten days after the execution thereof, or where not executed in the Colony within ten days after its receipt in the Colony, with a statutory declaration by the donor that he intends to remain out of the Colony for a period exceeding fourteen days from the date of such declaration, or from a date therein mentioned.

It seems to me, from the clear wording of the sub-section, that whether the Power of Attorney is executed in the Colony or outside it, it must be accompanied by a statutory declaration by the donor of the power that he intends to remain out of the Colony for a period exceeding fourteen days. I hold that in the absence of such a declaration by the trustee the law does not give him power to delegate his trust during his absence abroad for a period exceeding 14 days. Apart from the wording of the sub-section, which I think is clear, I have no doubt that this was the intention. This sub-section is similar to section 25 (4) of the Trustee Act 1925, except that our sub-section makes express provision for powers which are executed outside the Colony. That section modified the rule that a trustee had no power to delegate unless so authorised by the trust. But this statutory power to delegate is subject to certain statutory requirements, which are provided as safeguards and which must be complied with exactly. The requirement in sub-section (4) that the power of attorney shall be filed with a statutory declaration made by donor of the power is one of them. I hold that in the absence of the statutory declarations the defendants were unable to complete on the completion date, November 16th.

On the 16th of November, after the plaintiff's solicitor had received a letter from the defendants' solicitor dated the 15th in which he says "we are now ready to complete" and with which he enclosed the completion account containing an item (inter alia)

for interest charges from November 2nd to 17th, the Chief Clerk of the plaintiff's solicitor attended at the office of the defendants' solicitor with a cheque for the purchase price. He asked for the statutory declarations, but was informed that there were none. He then said that his instructions were not to complete without them. Whereupon the defendants' solicitor said: "Then we can't complete". On the same day the plaintiff's solicitor wrote to the defendants' solicitor that the plaintiff treated the contract as at an end.

Thus, as I understand the correspondence and evidence and in the light of my ruling on section 27 (4) of the Trustees Ordinance, the position on the 16th was as follows :—

(a) By their letter of November 5th the defendants had made the completion date of November 16th the essence of the contract;

(b) From first to last the defendants took up the position that they themselves were in a position to complete the contract on that day;

(c) Having regard to my ruling on section 27 (4) of the Trustees Ordinance, they were not in a position to complete it.

On those premises the question which I have to decide is whether the defendants' inability to complete on the 16th November amounted to a repudiation of the contract, and whether the plaintiff accepted the repudiation by his letter of the same date.

It is clear that where a contract of sale between a vendor and a purchaser fixes a day for completion, and provides that if the purchase is not completed on that day the purchaser shall pay interest from that day until completion, time is not of the essence of the contract so as to entitle the purchaser to repudiate the contract if the vendor, through some defect or difficulty which is not a defect or difficulty of title, is unable to complete the contract on the day fixed. That was the decision in *Hatten v. Russel*[1], where the vendors were the trustees under a will but had not been appointed trustees for the purposes of the Settled Land Acts. For this reason they were unable to give a proper receipt for the money. But this defect could easily be remedied, and steps had already been taken by the defendants' solicitors to that end, by applying to the Court to have them appointed as trustees under the Settled Land Acts. The facts of that case bear a similarity to the facts of this case. But the difference is that in this case the defendants, by their letter of November 5th, had made November 16th as the completion date an essential part of the contract. That brings the dictum of Lord Parker in *Stickney v. Keeble*[2] directly in point. That passage of his judgment lays down the proposition that the maxim that in equity the time fixed for completion is not of the essence of the contract "never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, where, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential". That dictum was referred to in *Harold Wood Brick Company Limited v. Ferris*[3] where it was held that time was the essence of the contract and the facts shewed that the purchaser had been unable to complete the purchase. It was held that his inability to complete the purchase amounted to repudiation, which justified an acceptance of the repudiation by the other party and entitled that other party to damages. Again in *Warren v. Moore*[4] time was the essence of the contract (which was for the sale of a public house as a going concern). As in this case, the vendor was not in a position to complete the purchase on the due date, and the purchaser was held to be entitled to the return of his deposit. I hold that by their inability to complete on the 16th November the defendants repudiated the contract, which repudiation the plaintiff was justified in accepting by his letter of the same date; and the basis of my decision is the fact that by their letter of November 5th the defendants had made time the essence of the contract.

This decision answers the defendants' contention that on the 16th November, when the plaintiff found that the defendants could not complete, it was the plaintiff's duty to give them reasonable notice to enable them to obtain the statutory declarations. *Green v. Sevin*[5] waas cited in support of this submission. I can only say that in *Green v. Sevin,* as in *Hatten v. Russel,* time was not of the essence of the contract. *Green v. Sevin* is authority for saying that the plaintiff need not have accepted the letter of the 5th November as a notice making time the essence of the contract. And at first he shewed no disposition to do so. He suggested taking out a Vendor and Purchaser Summons to determine the legal point which was in dispute. But although the defendants' solicitor acquiesced in that suggestion he persisted in his contention that the statutory declarations (for varying reasons) were not necessary, and his insistence that completion must take place on the 16th culminated in his letter of the 15th in which he still maintained that he was ready to complete and enclosed the completion account.

It was further argued that although by their letter of 5th November the defendants had made time the essence of the contract, this was waived by the negotiations to take out the Vendor and Purchaser Summons. This point was made in the course of the argument, and argued fully. But I cannot see that it is raised in the pleadings. In their pleadings the defendants say that the legal point on section 27 (4) of the Trustees Ordinance ought to have been referred for the decision of the Court on a Vendor and Purchaser Summons and that they were ready and willing that this course should be followed, and that this present action ought not to have been instituted. But they do not, in the defence, raise the issue of the waiver of their notice of 5th November by the negotiations for a Vendor and Purchaser Summons, nor was any amendment asked for. In the light of the judgment of Scrutton L. J. in *Blay v. Pollard and Morris*[6] which was followed by this Court in *Holden v. Soh Yiew Jin*[7] I could not decide the case on that point, even if I agreed with it. But I do not agree with it, because it is clear to me from the correspondence and particularly from the letter dated 15th November, with its enclosure, that the defendants' solicitor was holding the plaintiff to the 16th November as the completion date.

The final question is upon the matter of costs. Was the plaintiff justified in instituting these proceedings or could he, and should he, have applied by summons under section 4 of the Conveyancing and Law of Property Ordinance to have the point regarding the necessity for statutory declarations decided summarily. *In re Hargreaves and Thompson's Contract*[8] is authority for saying that if the summary procedure had been adopted the Court could, in addition to deciding the legal point, have directed such things to be done as are the natural consequence of the decision. But although I think that in giving a decision on the statutory declarations point the Court could have made an order giving the plaintiff all that he is claiming in this action, I doubt if the summary procedure would have been appropriate. It is clear that the summary procedure is intended for the purpose of deciding short points of law and construction. But there is more in this case than the short point of whether statutory declarations are required under section 27 (4) of the Trustees Ordinance. There is the further point of whether, upon the assumption that the statutory declarations were necessary, the conduct of the defendants upon the facts amounted to repudiation; and there might have been evidence to call to show what the facts were. It is true that so far as the evidence was concerned the plaintiff's solicitor might have come, or tried to come, to some agreement with the defendants' solicitor upon the facts. But I doubt if he was called upon to do that. And having regard to all the circumstances of this case I do not feel justified in saying that the plaintiff's solicitor was wrong in bringing this action instead of making use of summary procedure.

There must be judgment for the plaintiff as follows:—

(1) A declaration that the agreement made on 2nd October, 1946, between the Plaintiff of the one part and the Defendants as trustees of the 'Hok Im Koan' otherwise known as the 'Chinese Gospel Hall' Singapore, of the other part, whereby the Plaintiff agreed to purchase and the Defendants as such trustees agreed to sell all their share right title and interest of and in certain land in the Town and Island of Singapore, was terminated by the wrongful repudiation thereof by the Defendants which on the 16th day of November 1946 was accepted by the Plaintiff;

(2) $145/50, being his conveyancing costs;

(3) A declaration that the plaintiff is entitled to give a good receipt to the said auctioneers for the deposit;

(4) Costs of this action.

Stay of execution for 21 days, and if notice of appeal is given within 21 days a stay (save as to costs) until the determination of the appeal.

Costs to be paid to plaintiff's solicitor on his giving an undertaking that he will refund the same if the appeal is determined in favour of the defendants.

Judgment Accordingly.